

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DESERT VALLEY CONTRACTING,  
INC. a Nevada corporation,

Appellant,

vs.

IN-LO PROPERTIES, a Nevada limited  
liability company; EUGENE INOSE, an  
individual; JEFFREY LOUIE, an  
individual; DOES 1 through 10; and ROE  
ENTITIES 1 through 10,

Respondents,

CASE NO. 83338

Electronically Filed  
Jan 10 2022 02:33 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

From the Eight Judicial District Court, Department XV  
The Honorable Joe Hardy, District Judge  
District Court Case No. A-16-734351-C

---

**APPELLANTS' OPENING BRIEF**

---

CARRIE E. HURTIK, ESQ.  
Nevada Bar No. 7028  
JONATHON R. PATTERSON  
Nevada Bar No. 9644  
HURTIK LAW AND ASSOCIATES  
6767 West Tropicana Ave., Suite #200  
Las Vegas, NV 89103  
(702) 966-5200

## TABLE OF CONTENTS

	Page
NRAP 26.1 DISCLOSURE.....	v
APPELLANT'S STATEMENT REGARDING ROUTING.....	vi
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iv
JURISDICTIONAL STATEMENT .....	vii
ISSUE(S) PRESENTED .....	viii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	3
SUMMARY OF THE ARGUMENT .....	7
ARGUMENT .....	9
I.    THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RULED THAT THE APPELLANT BREACHED THE CONTRACT FIRST. ....	9
A.    Standard Of Review .....	9
B.    Respondent Breached First .....	9
II.   THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RULED THAT THE APPELLANT DID NOT PROVE THEIR DAMAGES BY A PREPONDERANCE OF THE EVIDENCE.....	12
A.    Standard of Review.....	12

B.	DVC Provided Clear Testimony Regarding Their Damages.	13
III.	WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN THEY RULED THAT DESERT VALLEY CONTRACTING BREACHED THEIR CONTRACT.....	15
A.	Standard of Review.....	15
B.	District Court is Inconsistent in Its Conclusions of Law. ....	16
C.	DVC Performed the Work in Good and Workmanlike Manner.....	16
D.	DVC Did Not Breach the Contract by Failing to Complete the Scope of Work and Provide INOSE With A Fully Restored Property. ....	17
E.	DVC Did Not Unilaterally Approve Change Orders.....	18
F.	DVC Did Not Fail to Pay Subcontractors In Full for Work to Be Completed.....	20
G.	DVC Did Not Unilaterally Approve Change Orders.....	21
	CONCLUSION.....	21
	CERTIFICATE OF COMPLIANCE.....	23
	CERTIFICATE OF SERVICE.....	25

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Am. First Fed. Credit Union v. Soro</i> 131 Nev. 737, at 739, 359 P.3d 105 (2015).....	11
<i>Gadbois v. Marathon Racing, Inc.</i> , No. 60167, 2013 WL 7156050, at *2 (Nev. Dec. 18, 2013).....	13,15
<i>Redrock Valley Ranch, LLC v. Washoe Cnty.</i> , 127 Nev. 451, 127 Nev. Adv. Rep. 38, 254 P.3d 64 (2011).....	9,11
<u><i>Ruhling v. Hackett</i></u> , 1 Nev. 360.....	7
<i>Weddell v. H20, Inc.</i> 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).....	12
<i>White v. Cont’l Ins. Co.</i> , 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003).....	13
 <b>Rules</b>	
NRAP 3A(b)(1).....	vii
NRAP 4(a)(6).....	vii

### **NRAP 26.1 DISCLOSURE**

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRA 26.1(a), and must be disclosed:

Desert Valley Contracting, Inc. has no parent company and no publicly listed company owns 10% or more of the Appellant's stock.

This representation is made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 4<sup>th</sup> day of January, 2022

/s/ *Jonathan Patterson*

CARRIE E. HURTIK, ESQ.

Nevada Bar No. 7028

JONATHON R. PATTERSON, ESQ.

Nevada Bar No. 9644

HURTIK LAW AND ASSOCIATES

6767 West Tropicana Ave., Suite #200

Las Vegas, NV 89103

(702) 966-5200

## **APPELLANT’S STATEMENT REGARDING ROUTING**

Pursuant to NRAP 28(a)(5), Appellant states that this case is an Appeal from a contract dispute and a Judgement involving claims, exclusive of interest, attorney’s fees and costs, of more than \$75,000.00 (Seventy-Five Thousand Dollars and Zero Cents). It is, therefore, not appropriate for the Court of Appeals. (NRAP 17(b)(6)).

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered judgment on all claims against Appellant following a Bench Trial held on April 8, 9, 10, & 11, 2019, June 19, 20 & 21, 2019, and July 24, 2019. A Notice of Entry of Findings of Fact and Conclusions of Law was entered on September 4, 2019. Appellant filed a timely notice of appeal on September 30, 2021. After Reversal and Remand, a Notice of Entry Amended Findings of Fact and Conclusion of Law Following Remand was filed on July 6, 2021. Appellant filed a timely notice of appeal on August 5, 2021. see NRAP 4(a)(6).

## **STATEMENT OF ISSUES PRESENTED**

- A. Whether the District Court abused its Discretion when it found that DVC's Breached the Contract First.
- B. Whether the District Court was in error when it ruled that DVC failed to meet its burden prove their damages as a result of INOSE's Breach of Contract.
- C. Whether the District Court was in error regarding their Conclusions of Law related to DVC had breaching their Contract with INOSE.



## **STATEMENT OF THE CASE**

This matter involves contract interpretation, breach of contract, and damages. The Respondent, EUGENE INOSE and IN-LO PROPERTIES (hereinafter collectively known as “INOSE”) built a custom residential home located at 587 Saint Croix Street, Henderson, Nevada 89012 (APN: 178-27-114-001) (hereinafter “Subject Property”).

In early August 2014, the Subject Property sustained substantial water damage due to a burst pipe. Appellant DVC preformed the reconstruction of the property. This matter involves contract interpretation, breach of contract, and damages that stem from the work performed by DVC. On March 31, 2016, DVC filed a Complaint alleging, Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Unjust Enrichment, and Intentional Interference with Contract (Appendix, Volume I, Exhibit 1, JNT000001-JNT000019). On June 7, INOSE filed an Answer and Counter-Claim alleging Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Unjust Enrichment, and Intentional Interference with Prospective Economic Advantage (Appendix, Volume I, Exhibit 2, JNT000020-JNT000047). On July 8, 2016, DVC filed its Answer to INOSE’S Counterclaim (Appendix, Volume I, Exhibit 3, JNT000048-JNT000019). On August 8, 2016, Defendant IN-LO PROPERTIES filed an Answer to DVC’s Complaint. (Appendix, Volume I, Exhibit 4, JNT000066-JNT000084).

A Bench Trial held on April 8, 9, 10, and 11, 2019, June 19, 20 and 21, 2019, and July 24, 2019. On July 24, 2019, the Court rendered its verdict wherein the Court did not award damages to either party. The Notice of Entry of Findings of Fact and Conclusions of Law was filed on September 4, 2019. DVC filed a timely Notice of Appeal on September 30, 2019. INOSE had previously sent DVC an Offer of Judgment in the amount of Fifty Thousand Dollars and Zero Cents (\$50,000.00). Therefore, on November 18, 2019, the Court Granted INOSE's Motion for Attorney's Fees and Costs based on the Courts award of no damages.

On March 3, 2021, the Court entered its Order of Reversal and Remand. In the Remand Order the Court held that the District Court erred when it construed a scrivener's error in the Construction Agreement entered into by the parties as an ambiguity and thus construed the provision against the drafter, Appellant Desert Valley. The Court stated that because they could not determine if the error was harmless, they reversed and remanded for further proceedings. The Court neither affirmed nor denied any of the other issues raised by Desert Valley Contracting in their initial appeal.

Upon remand, the District Court ordered further briefing and oral arguments on June 2, 2021. The District Court found that both parties committed material breaches, however found that that Desert Valley Contracting committed the first material breach of the construction agreement when it stopped work on Defendant's

construction project. The District Court further stated that even with the reformation of the Construction Agreement the both parties failed to present sufficient evidence proving their damages. On September 15, 2021, the District Court awarded additional attorney's fees to the Respondent as a result of the Appellant beating the Respondent's Offer of Judgment.

### **STATEMENT OF FACTS**

On or about 2006, INOSE began building the subject property through various subcontractors (Appendix, Volume I, Exhibit 5, Trial Testimony Day One, Page 7-10, JNT000091-JNT000094). In early August 2014, the Subject Property sustained substantial water damage due to a burst pipe. At the time, INOSE did not reside at the Subject Property, so the leak remained undetected for an unknown amount of time. Once the leak and damage were detected, an agent of INOSE contacted ServPro of Henderson, to begin the clean-up of the extensive water damage. (Appendix, Volume I, Exhibit 5, Trial Testimony Day One, Page 10-12, JNT000091-JNT000097). ServPro of Henderson is not a party to the litigation. ServPro of Henderson is a separate entity that is not affiliated with DVC (Appendix Volume V, Trial Testimony Day Five, Page 48, line 16-18, JNT000708). ServPro of Henderson conducted the initial demolition of the water damaged property. The Court heard testimony that ServPro of Henderson damaged and misplaced items during the initial demolition. (Appendix, Volume V, Exhibit 9, Trial Testimony Day

Five, Page 48, Lines 13-21, JNT000708). The Court heard testimony that ServPro of Henderson damaged driveway concrete with its equipment. (Appendix, Volume V, Exhibit 9, Trial Testimony Day Five, Page 83, JNT000743). Notwithstanding INOSE's failure to distinguish between the two companies, no testimony has been put forward that showed that DVC damaged or misplaced items.

Thereafter, ServPro of Henderson referred INOSE to DVC. After DVC and INOSE made contact, Mr. Inose and DVC's Employee Daniel Merritt met at the property and discussed the restoration of the property. (Appendix, Volume V, Exhibit 9, Trial Testimony Day Five, Page 104, JNT000764). Thereafter, on August 24, 2014, DVC, and INOSE, entered into a Contract wherein DVC would complete perform and rebuild of the Subject Property. The Contract stated specifically that;

"The undersigned hereby transfers, assigns and convey to Contractor his/her/their right...to the insurance proceeds...The undersigned agrees to immediately endorse and tender all drafts as produced to the Contractor. The undersigned further agrees to authorize Desert Valley Contracting Inc. to sign on their behalf and/or deposit all insurance checks that are issued to pay for the services performed pursuant to the contract".

(Appendix, Volume VII, Exhibit 12, JNT001137-JNT001138).

INOSE never endorsed or tendered the drafts he received from his insurance company, FIREMANS FUND, to DVC as required by the Contract. INOSE also never allowed DVC to sign on INOSE's behalf or deposit the insurance checks themselves (Appendix, Volume V, Exhibit 9, page 106, Lines 12-17, JNT000767).

INOSE never relinquished control of the purse strings for this project. The documents show that INOSE doled out payments to DVC over the course of a year, from September 2014 to September 2015. (Appendix, Volume VII, Exhibit 13, JNT001153-1155,1156)

The Contract contemplates that work may be performed outside the scope of the Insurance Claim. The Contract states that all uninsured work, including uninsured code-upgrade work, or any form of work not covered under Owner's Insurance Policy would be the responsibility of INOSE as signatory of the contract.

The Undersigned also agrees to and understands the General Conditions stated below. Contractor agrees to perform the insured work as approved by the Insurance Company and accept insurance proceeds, as payment for the uninsured work. Any uninsured work, which includes, but is not limited to, code-upgrade work, asbestos removal or any other form of work not covered under Owner's insurance policy shall be paid by insurance. (Appendix, Volume VII, Exhibit 12, JNT001138).

The contract also states in multiple places that if the contractor is forced to bring suit the prevailing party would be entitled to attorney's fees and the legal interest rate of Prime Plus Two (2) points. The contract further states that requests for additional work must be in writing so that they can be added to the Scope of Work. The contract does not state that these change orders need to be signed by DVC to be added to the Scope of Work. (Appendix, Volume VII, Exhibit 12, JNT001138).

In September of 2014, DVC began reconstruction of the Subject Property. During the demolition and reconstruction of the house, revised budgets were

presented to INOSE'S insurance company, FIREMAN'S FUND (Appendix, Volume VII, Exhibit 14, page 4, and 7, JNT001164, 1167). During the performance of the Contract, INOSE chose to have several upgrades in materials and work added onto the Contract's scope of work, which increased the original Contract's scope of work and cost. The Court heard testimony regarding the upgraded wine room, the upgrades to the pool area, and Master Bathroom (Appendix, Volume VI, Exhibit 10, Trial Testimony Day 6, pages 48-51, JNT000891-JNT000894). Additionally, other uncontrollable delays bedeviled the reconstruction. Italian Marble had to be imported from Tuscany and was not available for Three (3) months while it was held up in customs due to a dock workers labor dispute. (Appendix, Volume VI, Exhibit 9, Trial Testimony Day 5, Page 181, lines 23-25, JNT000841).

Mr. Inose received constant updates from Rob Ramirez regarding the project. (Appendix, Volume VII, Exhibit 6, page 76, lines 5-9, JNT000284). INOSE also spoke with the Sub-Contractors directly (Appendix Volume VII, Exhibit 14, page 14, JNT001174). The court found that INOSE was aware of the Change Orders for the project as well (Appendix, Volume VII, Exhibit 14, page 6, JNT001166). Against the advice of DVC, INOSE closed out the claim following the production of this estimate and prior to the project being completed. (Appendix, Volume VII, Exhibit 14, page 7, JNT001167). Then, in October 2015, DVC could no longer abide by INOSE's demands for the upgrades and changes that were exceeding the

insurance proceeds that were designated for reconstruction, not remodeling and updating the property. (Appendix, Volume VII, Exhibit 12, JNT001137-JNT001138).

On December 7, 2015 INOSE sent DVC correspondence terminating its contract. (Appendix, Volume VI, Exhibit 10, Trial Testimony, Page 144 Lines 14-20 JNT000987). The Contract states that should the Client (INOSE) terminate the Contractor (DVC) after the work has begun, INOSE is responsible for any fees and costs plus the profit DVC would have made had INOSE not repudiated the Contract. (Appendix, Volume VII, Exhibit 12, JNT001137-JNT001138). To date, INOSE has not paid that amount and DVC filed this action on March 31, 2016.

### **SUMMARY OF THE ARGUMENTS**

A. DVC had a contractual right to withdraw from the worksite if the Respondent withheld insurance proceeds. There is undisputed evidence that Inose withheld payment. Therefore, the District Court is in error by stating that

B. DVC proved damages of, at least, Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight cents (\$89,197.58). DVC has costs in the amount of One Hundred, Twelve Thousand, Four Hundred, Fifty-One Dollars and Eight Cents (\$1,012,451.08). DVC provided unrefuted testimony that the standard for the construction industry is a Twenty (20%) profit. The Twenty (20%) profit would be an additional Two Hundred, Two Thousand, Four Hundred Ninety Dollars

and Twenty-One Cents (\$202,490.21). Therefore, DVC is entitled to a total of One Million, Two Hundred Fourteen Thousand, Nine Hundred Forty-One Dollars and Thirty Cents (\$1,214,941.30) from INOSE at the time INOSE repudiated the Contract. DVC was paid at total of One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty-Three Dollars and Seventy-Two Cents, (\$1,125,734.89) from INOSE. Therefore, there is an Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight cents (\$89,197.58) deficient between the amount DVC was paid and the amount they are due under the contract.

C. The Conclusions of Law adopted by the Court under INOSE'S Breach of Contract action are inconsistent with the facts and evidence presented and must be overruled. INOSE cannot show damages by DVC to the subject property by what may have been done versus other parties. Furthermore, INOSE limited the Insurance proceeds available to himself and DVC by closing out the insurance claim prematurely, against the wishes of DVC. The Court found that INOSE was aware of change orders, but then finds DVC in breach for not getting approval from INOSE for those change orders. The Court finds that INOSE had control over the Insurance proceeds, in violation of the Contract, but the Court inexplicably holds DVC responsible for not paying the Sub-contractors timely. INOSE terminated DVC from the project and then the court curiously finds DVC in breach for not completing the project. These Conclusions of Law are clearly in error and should be reversed.



**I. THE DISTRICT COURT WAS IN ERROR WHEN IT RULED THAT THE APPELLANT BREACHED THE CONTRACT FIRST BY TELLING SUBCONTRACTORS QUIT WORK ON THE PROJECT.**

**A. Standard Of Review**

The standard for reviewing a district court's factual findings is an abuse of discretion. Those findings will not be set aside unless they are clearly erroneous or not supported by substantial evidence *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). Appellant contends that this issue should be heard de Novo as a matter of contract interpretation. In Nevada, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev. 451, 127 Nev. Adv. Rep. 38, 254 P.3d 641, 647-48 (2011). In this matter the District Court found that DVC breached the Contract Agreement first. (Appendix Volume VII-Exhibit 18, Findings of Fact and Conclusions of Law, Page 4, JNT001214)

**B. RESPONDENT INOSE CLEARLY BREACHED THE AGREEMENT FIRST BY FAILING TO TURN OVER INSURANCE PROCEEDS**

Pursuant to the Contract between the parties the Respondent was responsible for turning over the insurance proceeds over to DVC immediately upon receipt. Appendix Volume VII-Exhibit 12, Page 11, JNT001137-1138).

"The undersigned hereby transfers, assigns and convey to Contractor his/her/their right...to the insurance proceeds...The undersigned agrees to immediately endorse

and tender all drafts as produced to the Contractor. The undersigned further agrees to authorize Desert Valley Contracting Inc. to sign on their behalf and/or deposit all insurance checks that are issued to pay for the services performed pursuant to the contract”.

(Appendix, Volume VII, Exhibit 12, JNT001137-JNT001138).

The Contract directed the Respondent to turn over Insurance Proceeds he received from his insurance company Fireman’s Fund as the received them. During Construction, the Respondent turned over the checks piecemeal (see below Testimony). Mr. INOSE did not present any counter testimony that he was not holding onto insurance proceeds in violation of the contract. The Court itself found INOSE in Breach of Contract by failing to forward insurance proceeds as and when received to DVC (Appendix Volume VII, Exhibit 14, page 14, JNT001174). During testimony, Mr. Daniel Merritt, who is an employee of DVC, read the following portion of the Contract regarding insurance drafts:

Accordingly, undersigned authorize and directs their insured named below to make Desert Valley Contracting a payee to all insurance drafts, for all insurance and work performed by contractor on the above damaged property.

The undersigned also agrees to immediately endorse and tender all drafts that produced to the contractor. The undersigned further agrees to authorized Desert Valley Contracting to sign on their behalf and deposit all insurance checks that are issued, and to pay for the services performed, pursuant to the contract.

Q. So to your knowledge, did Mr. Inose sign over the insurance checks to Desert Valley Contracting, after he entered into the contract with them?

A. When certain tasks were finished at the job, or certain contractors, subcontractors needed payment, I believe that's -- that's when they were signed over.

(Appendix Volume VI, Trial Testimony, Page 106, Line 3-18, JNT000766)

The Contract further states that, "If in the event insurance proceeds are not issued, Contractor has the right to stop work until such time the insurance proceeds are released (Appendix Volume VII, Exhibit 12, JNT001138). In Nevada, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev. 451, 127 Nev. Adv. Rep. 38, 254 P.3d 641, 647-48 (2011). The objective of interpreting contracts "is to discern the intent of the contracting parties. Traditional rules of contract interpretation are employed to accomplish that result." *Davis v. Beling*, 128 Nev. 301, 128 Nev. Adv. Rep. 28, 278 P.3d 501, 515 (2012) (citation and internal quotation marks omitted). This court initially determines whether the "language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, at 739, 359 P.3d 105 (2015).

In this matter, DVC had a clear and unambiguous contractual right to stop work in the event that insurance proceeds were withheld, as they were in this case.

By the plain language of the contract, DVC had a clear right to stop work on the project if insurance proceeds were being withheld, and they were. The President of DVC, testified that the Respondent had stopped turning over the insurance proceeds. (Appendix Volume VII-JNT001092) By stopping work, DVC executed it's bargained for right under the agreement. It is clearly contrary to Nevada contract interpretation to determine that by stopping work, DVC breached the Contract and therefore are not entitled to damages. DVC cannot be in breach for the reasons stated in this Conclusion of Law and the Court ruling must be overruled.

The District Court's finding that DVC breached the agreement first by stopping work on the project or advising its subcontractors to stop working is clearly erroneous. As such, DVC cannot be in breach for the reasons stated in this Conclusion of Law or the Amended Findings of Fact and Conclusions of Law Following Remand and the District Court must be reversed.

## **II. THE DISTRICT COURT WAS IN ERROR WHEN IT RULED THAT THE APPELLANT DID NOT PROVE ITS DAMAGES BY A PREPONDERANCE OF THE EVIDENCE**

### **A. Standard Of Review**

A District Court's conclusions of law are reviewed de novo. *White v. Cont'l Ins. Co.*, 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003). A district court's decision regarding the calculation of an award of damages will not be disturbed on appeal absent an abuse of discretion. *Gadbois v. Marathon Racing, Inc.*, No. 60167, 2013

WL 7156050, at \*2 (Nev. Dec. 18, 2013) (quoting *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997)). This issue should be heard de novo because the issue at questions stems from the Court's Conclusion of Law regarding DVC's alleged failure to show by a preponderance of evidence they were damaged by the breach and not an actual damage calculation. (Appendix Volume VII-Exhibit 14, Findings of Fact and Conclusions of Law, Page 11, JNT001172). In the District Court's Initial Conclusions of Law and Amended Filed on September 15, 2021, the Court re-affirmed their ruling that DVC had failed to prove it's damages by a preponderance of the evidence.

**B. DVC Provided Clear Testimony Regarding Its Damages.**

In this matter, the Parties' Contract states that if the Client terminates the contract before the work is completed, they shall be responsible for the profit the Contractor would have been made had the contract not been repudiated. INOSE provided testimony that he terminated DVC on or around December 8, 2015. (Appendix, Volume VII, Exhibit 14, Page 9, JNT001169).

Pursuant to Exhibit 274, the Job and Billing Detail, DVC's cost for the project was One Hundred, Twelve Thousand, Four Hundred, Fifty-One Dollars and Eight Cents (\$1,012,451.08). (Appendix VII, Exhibit 13, JNT0001160). That means that at the time they were terminated DVC has spent One Hundred, Twelve Thousand, Four Hundred, Fifty-One Dollars and Eight Cents (\$1,012,451.08) on the project

DVC was paid approximately One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty-Three Dollars and Seventy-Two Cents, (\$1,125,734.89) from INOSE. Both DVC and INOSE agreed upon this amount.

During the testimony of Mr. Zachary, the following exchange occurred;

Q Okay. And so this -- Mr. Inose actually paid Desert Valley out approximately \$1,123,734.89. And I'm giving you that number, and I can go through all of the checks -- we did that in Exhibit 585 on one of the first days of trial with Mr. Inose.

MS. HURTIK: Do you want me to go through those, Your Honor?

THE COURT: \$1,123,000 and how much?

MS. HURTIK: \$734.89.

THE COURT: Now you don't need to. Unless you want to, but --

MS. HURTIK: No, no, no. I don't want -- as long as --

MR. BOSCHEE: That's the number I had, too, Your Honor.

THE COURT: Okay.

MS. HURTIK: Okay

(Appendix-Volume VII, Exhibit 11, Trial Testimony Day 7, page 42-43 Lines, JNT001162-63)

The owner of DVC is Dennis Zachary, who has over Thirty (30) years of experience in the construction industry. Mr. Zachary provided testimony that the Contract was to be performed on a "10 and 10" basis, meaning that DVC would earn an additional Twenty Percent (20%) over its costs on the project. The Twenty (20%) is comprised of Ten Percent (10%) to account for DVC's overhead and another Ten Percent (10%) to account for DVC's profit. INOSE did not provide any counter evidence regarding DVC's definition of costs and profit in a construction project.

The Twenty (20%) profit would be an additional Two Hundred, Two Thousand, Four Hundred Ninety Dollars and Twenty-One Cents (\$202,490.21). At a Twenty (20%) profit and overhead, DVC is entitled to a total of One Million, Two Hundred Fourteen Thousand, Nine Hundred Forty-One Dollars and Thirty Cents (\$1,214,941.30). DVC was paid at total of One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty-Three Dollars and Seventy-Two Cents, (\$1,125,734.89).

Therefore, DVC has been damaged in the amount of approximately Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight cents (\$89,197.58) because of the termination of the contract by INOSE. Those losses stem from the termination of the Contract by INOSE. DVC was deprived of the profit they were not paid at the time Inose terminated the contract.

### **III. WHETHER THE DISTRICT COURT WAS IN ERROR WHEN THEY RULED THAT DESERT VALLEY CONTRACTING BREACHED THE CONTRACT**

#### **A Standard of Review**

A district court's conclusions of law are reviewed de novo. *White v. Cont'l Ins. Co.*, 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003). A district court's decision regarding the calculation of an award of damages will not be disturbed on appeal absent an abuse of discretion. *Gadbois v. Marathon Racing, Inc.*, No. 60167, 2013 WL 7156050, at \*2 (Nev. Dec. 18, 2013) (quoting *Diamond Enterprises, Inc. v. Lau*,

113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997). This matter does not involve the calculation of damages, rather whether DVC has met their burden proving damages. This issue should be heard de novo because the issues at question regarding DVC's alleged Breaches of the contract stem from the Court's Conclusion of Law (Appendix Volume VII-Exhibit 14, Findings of Fact and Conclusions of Law, Page 14, JNT001175).

**B. District Court is Inconsistent in Its Conclusions of Law.**

In the District Court's Conclusions of Law on page 11, the Court found INOSE in breach of contract. However, according to the Court, DVC's cause of action failed because they did not prove its damages by a preponderance of the evidence. (Appendix, Findings of Fact and Conclusions of Law, Volume VII, Exhibit 14, Page 9, JNT001169). There are no additional reasons for DVC's lack of success listed under this cause of action. However, under the Conclusions of Law for INOSE's Breach of Contract, the Court lists several reasons that DVC breached the contract (Appendix Volume VII-Exhibit 14, Findings of Fact and Conclusions of Law, Page 11, JNT001175).

**C. DVC Performed the Work in Good and Workmanlike Manner.**

The Conclusions of Law wrongly determined that DVC breached by not completing the work in good and workmanlike fashion, particularly by causing damage to the property unrelated to the restoration of the property. This renovation



project was the result of a water leak. DVC was not the first company onsite. ServPro of Henderson was already on the scene removing property damaged by the water leak. INOSE himself could not testify as to each companies' role in the initial clean up.

Q So you arrive in Vegas and SERVPRO is out there. Do you meet them at the site?

A I met them at the house, correct.

Q Okay. And was it SERVPRO of Henderson?

A I -- I just know it was SERVPRO.

Q Okay. So at that juncture did that start -- did they have discussion with you and you have a contract that you signed with them to start general clean up?

A I don't remember any contract at this time that I signed; however, they were already starting clean up. I don't know if Rommel had signed the contract or I had signed the -- I don't know.

Q Okay. So once they had -- did they do all of the cleanup for the water intrusion?

A When you say "they" meaning SERVPRO?

Q SERVPRO.

A SERVPRO, yes. SERVPRO, as far as I know, did all the cleanup. I don't know how much Desert Valley Contracting or Contractor did and how much SERVPRO did. I'm not 100 percent sure of that.

(Appendix Volume I, Trial Testimony Day One, Page 11-12, Lines 24-16, JNT00009697)

Mr. INOSE has no idea what equipment or property was damaged by Servpro of Henderson in the initial remediation of the house versus any damage that was caused by DVC. Nor did INOSE distinguish any work that was in poor or unworkmanlike condition at the time he terminated DVC. Finally, given INOSE the fact terminated DVC before the project was completed it would be impossible for

them to do a final punch list or construction cleaning for the project. This Conclusion of Law is not supported by the facts of the case and should be overruled.

**D. DVC Did Not Breach the Contract by Failing to Complete the Scope of Work and Provide INOSE With A Fully Restored Property.**

As stated above, Mr. INOSE terminated DVC before the project was completed. Therefore, they could not complete the project. It's non-sensical to hold DVC responsible for not completing a project that it was terminated from. Additionally, Paragraph 31 in the same Conclusion of Law states that INOSE paid subcontractors directly Two Hundred, Fifty-Six Thousand, Four Hundred Eighty One Dollars and Forty -Six Cents (\$256,481.46), but could not distinguish what was an upgrade or what was paid to restore the property. INOSE failed to prove what was paid for extras and what was included in DVC's scope of work. (Appendix, Exhibit 14, Page 14-15, JNT001175-1176). INOSE received an upgraded house, not simply a "fully restored" house.

**E. DVC Did Not Breach the Contract by Failing to Complete the Scope of Work Within the Confines of the Insurance Proceeds**

The Insurance proceeds would have been sufficient to complete the project had INOSE not completed upgrades to the project or closed out the Insurance Claim with his Insurance Company FIREMAN'S Fund. The Court's Finding of Fact stated that Inose's testimony regarding DVC advising him to close out the Insurance claim

was not credible and that INOSE took no steps to reopen the claim after there appeared to be a need to do so. The reason that insurance claims are not closed out prior to completion of work is simple, until the project is finished, contractors don't know what additional issues may arise, during construction. DVC's Owner, Mr. Dennis Zachary, summed it up perfectly;

So that's one of the reasons we do not close out claims, because you will get hit. That's why we call it a contingency fund. Every job we do, we have to go back in and turn in a supplement to the insurance company. Every fire job we build that, say, is \$300,000, you'll get a \$40- to \$50,000 change order at the end time. And the insurance companies know that's coming. So they allow ten percent, at least ten percent of the contract to be there for contingency.  
(Appendix, Volume VII, Exhibit 11, Page 14, Lines 18-24, JNT001133)

DVC employee, Daniel Merritt was surprised by the Close out of the Insurance claim as well,

THE COURT: When did you, if you recall, when did you learn that the claim had been closed out?

THE WITNESS: I think it was in July. I believe it was in July when I actually learned that it had been closed out to where Fireman's sent them the last check and that was that. I believe it was July.

(Appendix Volume VI, Trial Testimony, Page 166, Line 14-19, JNT001109)

Therefore, since INOSE closed the insurance claim himself he denied DVC the opportunity to obtain additional funds to complete the project and it is inequitable to find them in breach under those circumstances.

///

///

**F. DVC Did Not Fail to Pay Subcontractors In Full for Work to Be Completed.**

Firstly, this Conclusion of Law is nonsensical. (Appendix-Findings of Facts and Conclusions of Law, Exhibit 14, Page 14, JNT001175). It states that DVC failed to pay the subcontractors in full for work to be completed by the subcontractors. DVC is not under an obligation to pay the subcontractors for work that has not yet been completed. Furthermore, INOSE did not forward all of the insurance proceeds to DVC, as he received them, as required by the Contract.

During testimony, Mr. Daniel Merritt, who is an employee of DVC, read the following portion of the Contract regarding insurance drafts:

Accordingly, undersigned authorize and directs their insured named below to make Desert Valley Contracting a payee to all insurance drafts, for all insurance and work performed by contractor on the above damaged property.

The undersigned also agrees to *immediately* endorse and tender all drafts that produced to the contractor. The undersigned further agrees to authorized Desert Valley Contracting to sign on their behalf and deposit all insurance checks that are issued, and to pay for the services performed, pursuant to the contract. (emphasis added.)

Q. So to your knowledge, did Mr. Inose sign over the insurance checks to Desert Valley Contracting, after he entered into the contract with them?

A. When certain tasks were finished at the job, or certain contractors, subcontractors needed payment, I believe that's -- that's when they were signed over.

(Appendix Volume VI, Trial Testimony, Page 106, Line 3-18, JNT000766)

Mr. INOSE did not present any counter testimony that he was not holding onto insurance proceeds in violation of the contract. The Court itself found INOSE

in Breach of Contract by failing to forward insurance proceeds as and when received to DVC (Appendix Volume VII, Exhibit 14, page 14, JNT001174). Clearly, DVC cannot be in breach for withholding payments to the Subcontractors if the Respondent withheld payments. This Conclusion of Law and the Court ruling must be overruled.

**G. DVC Did Not Unilaterally Approve Change Orders**

Change orders were abundant on this project. DVC employee's Rachelle Elliston and Daniel Merritt testified that Inose was aware of the Change Orders but would refuse to sign them (Appendix, Volume V, Exhibit 9, page 9, lines 17-19, JNT000712). The court found that INOSE was well aware of the Change Orders for the project as well (Appendix, Volume VII, Exhibit 14, page 6, JNT001166). The Court's Conclusion of Law that DVC unilaterally approved change orders is contrary to the Court's stated Finding of Fact and should be overruled.

**CONCLUSION**

The four corners of the Contract Agreement in this matter are clear and unambiguous. The Respondent had the right to fire the Appellant at any time. If he chose to do so however, the Appellant was entitled to the profit and overhead. At the time of termination the Appellant was entitled to Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight cents (\$89,197.58) in profit and overhead for the amounts that Appellant had expended. The judgment of the District Court completely dismisses the agreed upon provisions and rewards the

Respondent's overbearing behavior on this project. The District Court's Judgment should be reversed and remanded to the District Court, and DVC should be awarded Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight cents (\$89,197.58) in damages against INOSE and the award of attorney's fees be vacated.

Date: January 4, 2022.

HURTIK LAW & ASSOCIATES

By: /s/: *JONATHON R. PATTERSON, ESQ.*

---

CARRIE E. HURTIK, ESQ.

Nevada Bar No. 7028

JONATHON R. PATTERSON, ESQ.

Nevada Bar No. 9644

HURTIK LAW AND ASSOCIATES

6767 West Tropicana Ave., Suite #200

Las Vegas, NV 89103

(702) 966-5200

Attorney for Appellant

DESERT VALLEY CONTRACTING, INC

## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains words.

FINALLY, I CERTIFY that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be Found.

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this January 4, 2021.

HURTIK LAW & ASSOCIATES

By: /s/: *JONATHON R. PATTERSON, ESQ.*

---

CARRIE E. HURTIK, ESQ.

Nevada Bar No. 7028

JONATHON R. PATTERSON, ESQ.

Nevada Bar No. 9644

HURTIK LAW AND ASSOCIATES

6767 West Tropicana Ave., Suite #200

Las Vegas, NV 89103

(702) 966-5200

Attorney for Appellant

DESERT VALLEY CONTRACTING, INC



## **CERTIFICATE OF SERVICE**

I JONATHON R. PATTERSON, HEREBY CERTIFY that I am an employee of HURTIK LAW AND ASSOCIATES, and that on the 4<sup>th</sup> day of January 2022, I caused to be served a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF to be E-filed on all registered parties to the Supreme Court E-Flex System with the Clerk of the Court.

*/s/: JONATHON R. PATTERSON*

---

JONATHON R. PATTERSON  
Employee of Hurtik Law and Associates